

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS INC., and
PENGUIN RANDOM HOUSE LLC,

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through
5, inclusive,

Defendants.

Case No. 1:20-CV-04160-JGK

**MOTION FOR LEAVE TO FILE
AMICUS BRIEF OF KENNETH D. CREWS AND KEVIN L. SMITH
IN SUPPORT OF DEFENDANT INTERNET ARCHIVE'S MOTION
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Amici Kenneth D. Crews and Kevin L. Smith respectfully move for leave to file the accompanying amicus curiae brief in support of defendant Internet Archive on its motion for summary judgment and in opposition to plaintiffs' cross-motion. Counsel for Internet Archive consent to the filing of the brief; counsel for plaintiffs Hachette Book Group, Inc. et al. did not respond to amici's request for consent.

District courts have significant discretion to allow the filing of amicus briefs. In re GLG Life Tech. Corp. Sec. Litig., 287 F.R.D. 262, 265 (S.D.N.Y. 2012); Auto. Club of N.Y. Inc. v. Port Auth. of N.Y. & N.J., No. 11 Civ. 6746, 2011 WL 5865296, at *1–2 (S.D.N.Y. Nov. 22, 2011); United States v. Ahmed, 788 F. Supp. 196, 198 n.1 (S.D.N.Y.), aff'd 980 F.2d 161 (2d Cir. 1992). “An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the party are able to provide.” Citizens Against Casino Gambling in Erie Cty. v. Kempthorne, 471 F.

Supp. 2d 295, 311 (W.D.N.Y. 2007) (quoting Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (citations omitted)). This Court regularly permits amici to file briefs on matters relevant to cases before the Court. See, e.g., In re Lehman Bros. Holdings Inc. v. Intel Corp., No. 08-13555, 2015 WL 7194609, at *4 (S.D.N.Y. Sept. 16, 2015); C & A Carbone, Inc. v. Cty. Of Rockland, N.Y., No. 08 Civ. 6459, 2014 WL 1202699, at *4 (S.D.N.Y. Mar. 24, 2014); United States v. Apple, Inc., No. 12 Civ. 2826, 2012 WL 3195653, at *2 (S.D.N.Y. Aug. 6, 2012).

Amici are library and information scholars and historians with deep expertise regarding libraries and archives, the laws that govern them, and the roles they play in society. Amici submit this brief in support of defendant Internet Archive on its motion for summary judgment and its opposition to plaintiffs’ cross-motion seeking a ruling that Internet Archive’s conduct constitutes copyright infringement. Amici urge the court to consider the controlled digital lending (“CDL”) program at issue in this case not in a vacuum but against the backdrop of the long history of libraries and in the context of their evolving role as institutions that support and enhance democracy.

Amici are uniquely positioned to understand the issues at hand from diverse perspectives. Both have been leaders for decades in addressing issues of copyright and related concerns for libraries, archives, universities, publishers, museums, and other institutions. They are authors of numerous published works, including articles and other writings that have been scanned and shared by libraries, as well as books available for purchase and that pay royalties to the authors.¹

¹ See, e.g., KEVIN L. SMITH, OWNING AND USING SCHOLARSHIP: AN INTELLECTUAL PROPERTY HANDBOOK FOR SCHOLARS (Ass’n of Coll. and Rsch. Libr. 2014); COACHING COPYRIGHT (Kevin

One of the amici, Kevin L. Smith—in addition to being a librarian and library administrator—is the director of a long-established publisher that has an interest in both publishing scholarly literature and earning optimal revenues from sales of books and other works. Kevin L. Smith, THE UNIVERSITY OF KANSAS LIBRARIES, <https://lib.ku.edu/people/kevin-l-smith> (last visited Jul. 11, 2022). The other amicus, Kenneth D. Crews, is now in private law practice and has represented authors and publishers in their negotiation of agreements and in developing policies on proper adherence to principles of copyright law. Kenneth D. Crews, GIPSON HOFFMAN & PANCIONE, <https://www.ghplaw.com/our-people/kenneth-d-crews> (last visited Jul. 11, 2022).²

In light of the foregoing, amici respectfully request that this Court grant leave to file the accompanying amicus brief.

L. Smith & Erin L. Ellis eds., Am. Libr. Ass’n 2019); KENNETH D. CREWS, COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS: CREATIVE STRATEGIES AND PRACTICAL SOLUTIONS (Am. Libr. Ass’n 2020), KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION (Univ. of Chicago 1993).

² The views articulated in the accompanying brief are solely those of the amici and not necessarily the opinions or beliefs of the amici’s employers or clients. Amici have no direct financial interest in the outcome of this case but strongly believe that the law must continue to support, rather than impede, innovation in furtherance of independent and free access to information.

July 14, 2022

Respectfully submitted,

/s/Christopher T. Bavitz

Christopher T. Bavitz (CB0941)
Cyberlaw Clinic
Harvard Law School
Reginald F. Lewis Law Center
1557 Massachusetts Avenue, 4th Floor
Cambridge, MA 02138
Tel: 617-384-9125
Fax: 617-812-3050
Email: cbavitz@law.harvard.edu

Counsel for Amici Curiae
Kenneth D. Crews and Kevin L. Smith

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2022, this Motion for Leave was filed through the Court's Electronic Case Filing ("ECF") system. Notice of this filing will be sent electronically to the parties as identified on the Notice of Electronic Filing ("NEF") and may be accessed through the Court's system.

/s/Christopher T. Bavitz

Christopher T. Bavitz (CB0941)
Cyberlaw Clinic
Harvard Law School
Reginald F. Lewis Law Center
1557 Massachusetts Avenue, 4th Floor
Cambridge, MA 02138
Tel: 617-384-9125
Fax: 617-812-3050
Email: cbavitz@law.harvard.edu